

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-21
1 FEBRUARY 2016**

The Requester, Dotgay LLC, seeks reconsideration of: (1) the second Community Priority Evaluation (CPE) panel's report finding that the Requester did not prevail in CPE for the .GAY string (Second CPE Report), and ICANN's acceptance of that report; and (2) ICANN staff's response to the Requester's request pursuant to ICANN's Documentary Information Disclosure Policy (DIDP) for documents relating to the Second CPE Report.

I. Brief Summary.

The Requester submitted a community application for .GAY (Application). Three other applicants submitted standard (meaning, not community based) applications for .GAY. All four .GAY applications were placed into a contention set. As the Application was community based, the Requester was invited to and did participate in CPE for .GAY. The Requester's Application did not prevail in the first CPE. The Requester filed a reconsideration request (Request 14-44) with respect to the CPE panel's report finding that it had not prevailed (First CPE Report). The BGC granted reconsideration on Request 14-44 on the grounds that the Economic Intelligence Unit (EIU), the entity that administers the CPE process, had inadvertently failed to verify 54 letters of support for the Application, which contradicted an established CPE procedure. At the BGC's direction, the EIU then conducted a new CPE of the Application (Second CPE). The Application did not prevail in the Second CPE. As a result, the Application remains in contention with the other applications for .GAY. The contention set can be resolved by ICANN's last resort auction or by some other arrangement among the involved applicants. The Requester now seeks reconsideration of the Second CPE Report and ICANN's acceptance of it.

The Requester also filed a request pursuant to ICANN's DIDP (Second DIDP Request), seeking documents relating to the Second CPE Report. In its response (Second DIDP Response), ICANN staff identified and provided links to all publicly available responsive documents, and further noted that many of the requested documents did not exist or were not in ICANN's possession. With respect to those requested documents that were in ICANN's possession and not already publicly available, ICANN produced a number of documents to the Requester, and further explained that certain other documents would not be produced because they were subject to one or more of the Defined Conditions of Nondisclosure (Nondisclosure Conditions) set forth in the DIDP. The Requester also seeks reconsideration of the Second DIDP Response.

As for its challenge to the Second CPE Report, the Requester makes several claims as to why it contends reconsideration is warranted, including the Requester's assertions that:

- (i) the EIU imposed additional criteria or procedural requirements beyond those set forth in the Applicant Guidebook (Guidebook);
- (ii) the Second CPE Panel failed to comply with certain established ICANN policies and procedures because, in the Requester's view, the Second CPE Panel: (1) posed an insufficient number of clarifying questions; (2) is obligated to, but did not, disclose the identity of the objector to the Application; (3) wrongly concluded that an opposition letter was relevant; (4) should have considered certain unrelated community objection determinations; (5) did not adhere to the Guidebook in scoring element 2-A, nexus; (6) scored element 2-A, nexus, in a manner that is inconsistent with other CPE reports; and (7) scored element 4-A, support, in a manner that is inconsistent with other CPE reports; and

(iii) the EIU did not comply with the BGC's directives in its determination on Request 14-44.

The Requester seeks reconsideration of ICANN's Second DIDP Response on the grounds that ICANN staff improperly determined that some of the documents sought by the Requester were subject to the DIDP Nondisclosure Conditions and/or are not in ICANN's possession.

The Requester's claims do not support reconsideration. The Requester does not identify any misapplication of policy or procedure by the Second CPE Panel or ICANN staff. Rather, the Requester simply disagrees with the Second CPE Panel's determination and scoring of the Application, and with ICANN staff's application of the DIDP Nondisclosure Conditions. Substantive disagreements with the Second CPE Report and the Second DIDP Response, however, are not proper bases for reconsideration. Because the Requester has failed to show that either the Second CPE Panel or ICANN staff acted in contravention of established policy or procedure, the BGC concludes that Request 15-21 be denied.

II. Facts.

A. Background Facts.

The Requester submitted a community application for .GAY.¹

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings Limited each submitted standard applications for .GAY.² Those applications were placed in a contention set with the Requester's Application.

On 23 February 2014, the Requester's Application was invited to participate in CPE. CPE is a method of resolving string contention, described in section 4.2 of the Guidebook. It

¹ See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

² See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1460>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1115>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1519>.

will occur only if a community application is in contention and if that applicant elects to pursue CPE. The Requester elected to participate in CPE for .GAY (First CPE), and its Application was forwarded to the EIU, the CPE administrator, for evaluation.³

On 6 October 2014, the CPE panel (First CPE Panel) issued its report on the Requester's Application (First CPE Report).⁴ The First CPE Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application had not prevailed in CPE.⁵

On 22 October 2014, the Requester submitted Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of that Report.

Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP (First DIDP Request), seeking documents related to the First CPE Report.

On 31 October 2014, ICANN responded to the First DIDP Request (First DIDP Response).⁶ ICANN identified and provided links to all publicly available documents responsive to the First DIDP Request, including comments regarding the Application, which were posted on ICANN's website and considered by the First CPE Panel.⁷ ICANN noted that any additional documents responsive to the requests were either: (1) already public; (2) not in ICANN's possession; or (3) not appropriate for public disclosure because they were subject to certain Nondisclosure Conditions and that the public interest in disclosing the information did not outweigh the harm that may be caused by such disclosure.⁸

³ See Community Priority Evaluation (CPE), <http://newgtlds.icann.org/en/applicants/cpe#status>.

⁴ *Id.*

⁵ See CPE Report, available at <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

⁶ See <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

⁷ See *id.*, Pgs. 3-4.

⁸ See generally *id.*

On 29 November 2014, the Requester submitted a revised Reconsideration Request 14-44 (Revised Request 14-44).⁹ Revised Request 14-44 set forth different arguments than those raised in the original Request 14-44, but still sought reconsideration of the First CPE Report and ICANN's acceptance of it, and also sought reconsideration of the First DIDP Response.

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.¹⁰ The BGC specified that "new CPE evaluators (and potentially new core team members) [were] to conduct a new evaluation and issue a new report that will supersede the existing CPE Panel's Report."¹¹

In accordance with the BGC's determination, the EIU administered the Second CPE, appointing two new evaluators and one new core team member.

On 8 October 2015, the Second CPE Panel issued the Second CPE Report, finding that the Application did not prevail in the Second CPE.¹²

On 22 October 2015, the Requester submitted Reconsideration Request 15-21 (Request 15-21), seeking reconsideration of the Second CPE Report and ICANN's acceptance of it.

Also on 22 October 2015, the Requester submitted a request pursuant to ICANN's DIDP (Second DIDP Request), seeking documents related to the Second CPE Report.

On 21 November 2015, ICANN responded to the DIDP Request (Second DIDP Response).¹³ ICANN produced some documents in response to the Second DIDP Request, and

⁹ See <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

¹⁰ Determination of BGC, Reconsideration Request 14-44, *available at* <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf>.

¹¹ *Id.* at Pgs. 31-32.

¹² Second CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

also identified and provided links to all publicly available documents responsive to the Second DIDP Request. ICANN noted that any additional documents responsive to the requests were either: (1) already public; (2) not in ICANN’s possession; or (3) not appropriate for public disclosure because they were subject to certain Nondisclosure Conditions and that the public interest in disclosing the information did not outweigh the harm that may be caused by such disclosure.¹⁴

On 4 December 2015, the Requester submitted a revised Reconsideration Request 15-21 (Revised Request 15-21), which still seeks reconsideration of the Second CPE Report and ICANN’s acceptance of it, and also seeks reconsideration of the Second DIDP Response.¹⁵

On 12 January 2016, the President of UN-GLOBE sent a letter to ICANN regarding dotgay LLC’s Application and Reconsideration Request 15-21, which ICANN reviewed and considered.

On 13 January 2016, the Requester sent a letter to ICANN regarding its Application and Reconsideration Request 15-21, which ICANN reviewed and considered.

B. Relief Requested.

The Requester asks that ICANN:

1. “[S]uspend the process for string contention resolution in relation to the .GAY gTLD;”
2. “[R]eview the Requester’s above requests, in particular in view of identifying and correcting process and policy errors that have been made by the EIU and ICANN[.]”

(continued...)

¹³ DIDP Response, *available at* <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

¹⁴ *Id.*

¹⁵ *See generally* <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

3. “[S]et aside the Second CPE Report and the resulting Determination;”
4. “[R]equest a third party other than the EIU to perform a new determination at ICANN’s cost in view of the CPE criteria set out in the Applicant Guidebook;”
5. “[W]ithin a timeframe of one month following the appointment of such third party evaluator, allow Requester to submit a written statement to such third party;” and
6. “[F]ollowing that, organize a telephonic or in-person hearing whereby the Requester can submit, present and discuss its arguments and relevant information before ICANN or such third party appointed by ICANN, in view of enabling the latter to take an informed decision on the issue[.]”
7. In the alternative, the “Requester respectfully requests ICANN to reconsider the Determination and determine that the Application meets the required thresholds for eligibility under the [CPE] criteria set out in the Applicant Guidebook on the basis of the information and arguments provided herein, and provide to the Application” a score of four out of four points with respect to the nexus and community endorsement criteria.
8. “In any case, given the issues encountered by Requester, provide Requester with a full refund of the CPE fees[.]”¹⁶

III. The Relevant Standards For Reconsideration Requests, CPE, and DIDP.

A. Reconsideration Requests.

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹⁷ The Requester challenges staff action. Dismissal of a

¹⁶ Request, § 9, Pgs. 24-25.

¹⁷ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

(a) one or more staff actions or inactions that contradict established ICANN policy(ies); or

request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it is asserted that a panel failed to follow established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.¹⁸

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports. Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the Second CPE Panel violated any established policy or procedure.

B. Community Priority Evaluation.

The standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition, the EIU – the firm selected to perform CPE – has published supplementary guidelines (CPE Guidelines) that provide more detailed scoring guidance, including scoring rubrics, definitions of

(continued...)

(b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

¹⁸ See BGC Recommendation on Reconsideration Request 13-5, *available at* <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>.

key terms, and specific questions to be scored.¹⁹

CPE will occur only if a community based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.²⁰ CPE is performed by an independent panel composed of two evaluators who are appointed by the EIU.²¹ A CPE panel’s role is to determine whether the community based applicant fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points.

C. Documentary Information Disclosure Policy.

ICANN considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN’s approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN’s operational activities. In that regard, ICANN has identified many categories of documents that are made public as a matter of due course.²² In addition to ICANN’s practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN make public documentary information “concerning

¹⁹ CPE Guidelines available at <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

²⁰ Guidebook, § 4.2.

²¹ *Id.* at § 4.2.2.

²² See ICANN Documentary Information Disclosure Policy, *available at* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

ICANN’s operational activities, and within ICANN’s possession, custody, or control,” that is not already publicly available.²³

In responding to a request for documents submitted pursuant to ICANN’s DIDP, ICANN adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).²⁴ The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN’s website].”²⁵

Per the DIDP, ICANN reserves the right to withhold documents if they fall within any of the DIDP Nondisclosure Conditions, which include, among others: (i) “[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates [...]”; (ii) “[i]nformation provided to ICANN by a party that...[could prejudice] commercial interests ... or was provided pursuant to a nondisclosure agreement [...]”; and (iii) “[c]onfidential business information and/or internal policies and procedures.”²⁶ Notwithstanding the above, information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.²⁷

IV. Analysis And Rationale.

²³ *Id.*

²⁴ See DIDP Response Process, available at <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

²⁵ *Id.*; see also, “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁶ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁷ *Id.*

The Requester seeks reconsideration of the Second CPE Report finding that the Application did not prevail in the Second CPE, as well as reconsideration of ICANN staff's Second DIDP Response. As discussed below, the Requester's claims do not identify any conduct by the EIU or ICANN staff that contradicted an established policy or procedure, which is required to support reconsideration.

A. The EIU Did Not Improperly Impose Any Additional Criteria Or Procedural Requirements.

The Requester claims that the EIU promulgated four documents after the publication of the final version of the Guidebook that the Requester contends impose "new or additional requirements": (1) the EIU's CPE Panel Process Document; (2) the CPE Guidelines; (3) ICANN's CPE Frequently Asked Questions page, dated 10 September 2014 (FAQ Page); and (4) an ICANN document summarizing a typical CPE timeline (CPE Timeline) (collectively, CPE Materials).²⁸ The Requester contends that the EIU's reliance upon these documents constitutes discrimination against community based applications because such applicants were not permitted to amend their applications after these documents were published.²⁹ The Requester also argues that the EIU's use of these documents violates the policy recommendations or guidelines issued by the Generic Names Supporting Organization (GNSO) relating to the introduction of new gTLDs.³⁰

As a threshold issue, any challenge to the CPE Materials is time-barred. The last of the CPE Materials was published on 10 September 2014. Reconsideration requests challenging ICANN staff action must be submitted within 15 days of "the date on which the party submitting the request became aware of, or reasonably should have become aware of, the

²⁸ Request, § 8.3, Pgs. 6-8. The CPE Materials are the Requester's Annexes 4A-4D.

²⁹ *Id.* at Pg. 7.

³⁰ *Id.*

challenged staff action.”³¹ The proper time to challenge the development of the CPE Materials has long since passed.

Moreover, none of the CPE Materials comprise an addition or change to the terms of the Guidebook:

- The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook’s provisions concerning CPE³² and summarizing those provisions.³³ The CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements. The Requester has identified no specific aspect of the CPE Panel Process Document that imposes obligations greater than or different from those set forth in the Guidebook.³⁴
- The CPE Guidelines expressly state that they do “not modify the [Guidebook] framework [or] change the intent or standards laid out in the [Guidebook].”³⁵ Rather, the Guidelines are “an accompanying document to the [Guidebook] and are meant to provide additional clarity around the scoring principles outlined in the [Guidebook] . . . [and to] increase transparency, fairness, and predictability around

³¹ Bylaws, Art. IV, § 2.5

³² The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues was selected as the CPE panel firm through ICANN’s public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN CALL FOR EXPRESSIONS OF INTEREST (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

³³ CPE Panel Process Document, available at <https://newgtlds.icann.org/en/applicants/cpe>.

³⁴ The CPE Panel Process Document provides that letters submitted in support of or in opposition to an application that the EIU deems relevant are forwarded to the CPE evaluators, who verify them. *Id.* at Pg. 5. The Requester cites a blog post written by the ICANN Ombudsman where he refers to an EIU comment that reiterates its adherence to this policy. The Requester argues that because the EIU (accurately) states that “verification is not required by the [Guidebook,]” this confirms “that the EIU has not applied the [Guidebook’s] criteria and procedures, but rather its own processes.” (See Request, § 8.3, Pg. 8 (citing <https://omblog.icann.org/>)). However, the CPE Materials are entirely consistent with the Guidebook, for the reasons discussed above. Indeed, reconsideration was previously granted with respect to Request 14-44 based upon the EIU’s inadvertent failure to verify certain letters submitted in support of the Application; that the EIU has complied with those same verification procedures in the Second CPE cannot now support reconsideration.

³⁵ CPE Guidelines, available at <https://newgtlds.icann.org/en/applicants/cpe>, Pg. 2.

the assessment process.”³⁶ In addition, the CPE Guidelines were published after extensive input from the Internet community,³⁷ and are “intended to increase transparency, fairness and predictability around the assessment process.”³⁸ Indeed, the final version of the CPE Guidelines “takes into account all feedback from the community.”³⁹ The Requester does not provide any examples of a requirement set forth in the CPE Guidelines that contravenes the Guidebook.

- The FAQ Page does not impose any CPE requirements.⁴⁰ Rather, the FAQ Page summarizes requirements in the Guidebook and accompanying CPE documents, and provides information such as the estimated duration of a CPE and applicable fees. The FAQ Page makes clear that all CPE procedures must be consistent with the Guidebook: “The CPE guidelines are an accompanying document to the [Guidebook] and are intended to provide additional clarity around process and scoring principles as defined in the [Guidebook]. The CPE guidelines do not change the [Guidebook] framework or change the intent or standards established in the [Guidebook].”⁴¹
- The CPE Timeline does not impose any requirements, but instead summarizes the timeframes typical for the CPE process.⁴² The Guidebook does not impose any deadlines upon either CPE participants or the EIU, thus there is no conflict between the CPE Timeline and any applicable policy or procedure.

³⁶ *Id.*

³⁷ See Community Priority Evaluation (CPE), available at <http://newgtlds.icann.org/en/applicants/cpe>.

³⁸ CPE Guidelines, Pg. 2.

³⁹ See Final Community Priority Evaluation Guidelines Published, available at newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en.

⁴⁰ Updated CPE Frequently Asked Questions (FAQs), available at <https://newgtlds.icann.org/en/applicants/cpe>.

⁴¹ *Id.* at Pg. 4.

⁴² CPE Processing Timeline, available at <https://newgtlds.icann.org/en/applicants/cpe>.

The Requester claims ICANN should have permitted applicants to amend their community based applications after the promulgation of the CPE Materials.⁴³ However, as set forth above, the CPE Materials did not effectuate any amendment to the Guidebook, or render more stringent any requirement set forth therein.

Further, nothing about the development of the CPE Materials violates the GNSO policy recommendations or guidelines relating to the introduction of new gTLDs as the Requester has suggested. On 8 August 2007, the GNSO published the Final Report on the Introduction of New Generic Top-Level Domains (GNSO Final Report), which sets forth the principles and implementation guidelines for the introduction of new gTLDs.⁴⁴ On 28 June 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs as set forth in the GNSO Final Report.⁴⁵ After approval of the 19 policy recommendations, ICANN undertook an open and transparent implementation process, culminating in the Board's approval of the Guidebook. Actions taken pursuant to the Guidebook – such as the development of the CPE Materials – are not inconsistent with the relevant GNSO recommendations.

In sum, no reconsideration is warranted based on the development or use of the CPE Materials, because any such arguments are both time-barred and without merit.

B. No Reconsideration Is Warranted With Respect to the Second CPE Report.

The Requester raises seven arguments as to why reconsideration is warranted with respect to the Second CPE Report. The Requester contends that the Second CPE Panel: (1) posed an insufficient number of clarifying questions; (2) is obligated to, but did not, disclose the identity of the objector to the Application; (3) wrongly concluded that an opposition letter was

⁴³ Request, § 8.3, Pgs. 6-7.

⁴⁴ See <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

⁴⁵ See http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm#_Toc76113171.

relevant; (4) should have considered certain unrelated community objection determinations; (5) did not adhere to the Guidebook in scoring element 2-A, nexus; (6) scored element 2-A, nexus, in a manner that is inconsistent with other CPE reports; and (7) scored element 4-A, support, in a manner that is inconsistent with other CPE reports. The Requester's claims do not support reconsideration because none identify any policy or procedure violation.

1. No Policy Or Process Requires The EIU To Ask Clarifying Questions.

The Requester claims reconsideration is warranted because the EIU “misguided and misled” the Requester into thinking it had garnered a passing score as to each CPE criteria because the Second CPE Panel did not pose any clarifying questions (CQs) regarding the Application’s responses to “community-related questions.”⁴⁶ The Requester further asserts that, because the Second CPE Report noted that the Requester’s responses to certain CQs proved useful to the analysis, the Second CPE Panel had an obligation to pose CQs with respect to each element for which the Application did not garner the full score.⁴⁷ The Requester’s argument is based upon the process for CQs that applied during Initial Evaluation (IE) but that process does not apply in CPE. That is, while it is the case during IE that the issuance of a CQ signals that “additional information is needed before a passing score can be given,”⁴⁸ in CPE, the fact that no CQs were issued with respect to a given element does not necessarily mean full points will be awarded, but instead simply that the CPE panel has not requested any further information regarding it. ICANN has never stated that the CQ process for IE extends to CPE. In fact, the CPE Panel Process Document provides that: “*If* the core team so decides, the EIU *may* provide a

⁴⁶ Request, § 8.4, Pgs. 8-9.

⁴⁷ *Id.* at Pg. 9.

⁴⁸ See <http://newgtlds.icann.org/en/applicants/clarification-questions/faqs>.

clarifying question (CQ) to be issued via ICANN to the applicant”⁴⁹ Indeed, the Requester acknowledges that there is no established policy or procedure *requiring* CPE panels to pose CQs to applicants and that the decision to ask CQs is optional.⁵⁰ In any event, the Requester has not identified any material information that was not available to the Second CPE Panel based on the number of CQs posed. Absent any indication of what information was not available (and which required clarification), or a specific policy or procedure requiring CPE panels to pose CQs, no reconsideration is warranted based on the fact that the Second CPE Panel only posed CQs with respect to some of the elements for which it did not award the Application full points.

2. No Policy Or Process Required The Second CPE Panel To Identify The Objector To The Application.

The fourth CPE criterion, community endorsement, evaluates community support for and/or opposition to an application through the scoring of two elements—4-A, “support” (worth two points), and 4-B, “opposition” (worth two points).⁵¹ Pursuant to the Guidebook, to receive a maximum score for the opposition element, there must be “no opposition of relevance” to the application, and a score of one point is appropriate where there is “[r]elevant opposition from one group of non-negligible size.”⁵² Here, the Second CPE Panel awarded the Requester one out of two points, because it:

determined that there is opposition to the application from one group of non-negligible size. The opposition comes from a local organization in the United States whose mission, membership, and activities make it relevant to the community as defined in the application. The organization is of non-negligible size, as required by the AGB. The grounds of opposition are related to how the applied-for string represents the diversity of the LGBTQ community and the opposition is not made for any reason

⁴⁹ CPE Panel Process Document, Pg. 3 (emphasis added).

⁵⁰ Request, § 8.4, Pg. 8.

⁵¹ Guidebook, § 4.2.3.

⁵² *Id.*

forbidden by the AGB, such as competition or obstruction. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.⁵³

The Requester contends that reconsideration is warranted because the Second CPE Panel did not identify *which* opponent to the Application the Second CPE Panel refers to in the above-quoted analysis.⁵⁴ While the Requester objects that it is “impossible to . . . verify” whether the opposing entity is relevant and of non-negligible size,⁵⁵ the Requester points to no Guidebook, CPE Guideline, or other policy or procedure requiring a CPE panel to provide the Requester with the name of the opposing entity. Indeed, no such policy exists.⁵⁶ The CPE Guidelines explicitly set forth the evaluation process with respect to the “opposition” element, and do not include any disclosure requirements regarding the identity of the opposition.⁵⁷ No reconsideration is warranted by virtue of the Second CPE Panel’s decision not to identify the objector.

3. Established Policy Requires The CPE Panel—Not Applicants—To Determine The Relevance Of Letters Sent In Opposition To Or In Support Of Applications.

The Requester claims reconsideration is warranted because, according to the Requester, the opposition letter submitted by an entity called Q Center (which is located in Portland, “the city where one of the other applicants for the .GAY gTLD is based”) was subsequently withdrawn by Q Center and should not have been deemed relevant in the first instance.⁵⁸ This argument is factually inaccurate and does not support reconsideration.

⁵³ Second CPE Report, Pg. 11.

⁵⁴ Request, § 8.5, Pg. 9.

⁵⁵ *Id.*

⁵⁶ Moreover, all opposition and support letters evaluated by the CPE Panel are publicly available.

⁵⁷ CPE Guidelines, Pgs. 19-20.

⁵⁸ Request, § 8.6, Pg. 11-12. While the Second CPE Report does not disclose whether the Panel deemed this particular opposition letter relevant, the Second CPE Panel noted that it “has reviewed all letters of opposition and support, even when more than one letter has been received from the same organization. In those cases, as with all others, the Panel has reviewed each letter to determine the most current stance of each organization with respect to the application.” Second CPE Report at 11.

First, the Requester fails to mention the fact following the retraction of its opposition letter, the Q Center then retracted its withdrawal of the opposition letter and reaffirmed its opposition to the Requester’s Application.⁵⁹ On 8 January 2014, Q Center submitted a letter in opposition to the Application.⁶⁰ On 1 April 2015, Q Center purported to retract that letter of opposition.⁶¹ But on 25 July 2015, prior to the Second CPE, Q Center *withdrew* its letter disavowing its original opposition.⁶² In the 25 July 2015 letter, Q Center specifically states that it “stand[s] by the original letter”—which had opposed the Application—and that the letter withdrawing its opposition to the Application was sent at a time when “Q Center was in a period of major transition and the board could not prioritize [the Requester’s] concerns[.]”⁶³ In other words, Q Center retracted its withdrawal of its opposition letter and *reiterated its original opposition* to the Application. As such, no reconsideration is warranted based on Second CPE Panel’s consideration of the original opposition letter.

Second, there is no policy or procedural violation in the EIU’s consideration of the original opposition letter. The Requester argues that reconsideration is warranted because, in the Requester’s view, the EIU is inconsistent in the manner in which it treats opposition letters. In particular, the Requester claims that the EIU wrongly deemed the Q Center opposition letter relevant while a different CPE panel “disregard[ed] the letter of opposition of an international organization . . . as ‘not relevant’ in the determination regarding the .RADIO gTLD application[.]”⁶⁴ The Requester, however, has identified no procedural violation inherent in

⁵⁹ See <https://www.icann.org/en/system/files/correspondence/oshea-to-chalaby-et-al-25jun15-en.pdf>.

⁶⁰ See <https://www.icann.org/en/system/files/correspondence/mccullough-jones-to-chalaby-et-al-08jan14-en.pdf>.

⁶¹ See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-14apr15-en.pdf>.

⁶² See <https://www.icann.org/en/system/files/correspondence/oshea-to-chalaby-et-al-25jun15-en.pdf>.

⁶³ *Id.*

⁶⁴ Request, § 8.8.3, Pg. 17.

these differing results, which were reached with respect to different opposition letters in different cases concerning different strings with different factual scenarios.

Specifically, the Second CPE Panel determined that the opposition letter was relevant because it was sent by an entity of “non-negligible size, as required by the [Guidebook]” and “[t]he grounds of opposition are related to how the applied-for string represents the diversity of the LGBTQ community.”⁶⁵ Meanwhile, the CPE panel assessing the .RADIO application found that the opposition letters received were not relevant because they were sent “(1) from individuals or groups of negligible size, or (2) were not from communities either explicitly mentioned in the application nor from those with an implicit association to such communities.”⁶⁶ Different outcomes by different independent experts related to different gTLD applications involving different facts and circumstances is to be expected, and does not comprise evidence of any policy or procedure violation. Further, the Requester cites no policy or procedure permitting applicants to supplant CPE panels’ views as to the relevance of letters of support or opposition, which the Requester recognizes is a matter the Guidebook requires CPE panels (and not applicants) to evaluate.⁶⁷

As such, the Requester’s argument that its Application was handled differently than an application for .RADIO fails to support reconsideration, as the Second CPE Panel’s (and ICANN’s) handling of the Q Center correspondence adhered to all applicable policies and procedures.

4. No Policy Or Procedure Required The Second CPE Panel To Consider Determinations Rendered In Community Objection Proceedings.

⁶⁵ Second CPE Report , Pg. 11.

⁶⁶ See .RADIO CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

⁶⁷ Request, § 8.6, Pg. 13; Guidebook § 4.2.3.

The Requester claims reconsideration is warranted because the Second CPE Report did not take into account statements made in expert determinations overruling community objections to applications for the strings .GAY and .LGBT.⁶⁸ This argument fails to support reconsideration because the Guidebook sets forth no requirement that CPE panels consider community objection determinations, and also because here the Second CPE Panel was aware of the statements made in the expert determinations overruling the community objections to the applications for the .GAY and .LGBT strings.

As to the first point, the New gTLD Program's dispute resolution processes, which include the community objection process, provide parties with the opportunity to object to an application and have their concerns considered by an independent panel of experts. In contrast, CPE is a method of resolving string contention and is intended to resolve cases where two or more applicants for an identical or confusingly similar string *successfully complete* all previous stages of the evaluation and dispute resolution processes. The dispute resolution and string contention procedures were developed independently of each other with their distinct purposes in mind. The Guidebook contains no instruction or even suggestion that CPE panels must consider statements made in objection proceedings or determinations, especially those made in objection proceedings regarding a different applied-for string. Given that no established policy or procedure requires CPE panels to consider expert determinations issued to resolve community objections, no reconsideration would be warranted if the Second CPE Panel had not done so.

In any event, this argument is based on a flawed factual premise because the EIU was aware of the community expert determinations relating to the .GAY and .LGBT gTLDs ICANN ensured that the EIU was aware of Request 14-44 when it conducted the Second CPE by

⁶⁸ Request, § 8.7, Pgs. 13-14.

providing the EIU with all materials related to Request 14-44 provided the EIU with all materials related to Request 14-44 and the following instructions:

Our intention was to impress upon the panel and evaluators the reconsideration request materials should be used to inform the evaluation, but it should not be part of the application. The materials should merely be considered relevant, much in the same way that an objection determination may also be considered relevant and inform the panel's understanding of the community. Here the materials may also inform the panel on the "landscape" of the proposed TLD, community, and the applicant.⁶⁹

Request 14-44 makes the same verbatim argument regarding the relevance of the community expert determinations relating to the .GAY and .LGBT gTLDs that are asserted in this Request 15-21, including quoting the paragraph the Requester now argues was most critical for the Second CPE Panel to consider, and also attached those expert determinations as exhibits to Request 14-44, all of which were provided to the EIU for the Second CPE.⁷⁰

In sum, no reconsideration would be warranted had the Second CPE Panel not considered community objection determinations in rendering its report because no policy or procedure requires it to do so, but it did consider pertinent information regarding the relevant objections here in any event.

5. The Second CPE Panel Complied With All Applicable Procedures In Evaluating Element 2-A (Nexus).

The Requester contends that the Second CPE Panel erred in its analysis of the nexus element because it did not take into account the specific statements raised in the Application

⁶⁹ See Email from ICANN staff to EIU, dated 25 February 2015, produced in response to the Requester's DIDP Request, and available at <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

⁷⁰ See 21 October 2015 DIDP Response at Pg. 10, available at <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>; Request 14-44 at Pg. 13, available at <https://www.icann.org/en/system/files/files/request-dotgay-redacted-29nov14-en.pdf>; Request, § 8.7, Pg. 14.

relating to the definition of the gay community.⁷¹ The Requester, however, does not identify any policy or procedure violation, but instead only offers substantive disagreement with the Second CPE Panel’s determination that zero points were warranted with respect to the nexus element.

In awarding zero points for element 2-A (nexus), the Second CPE Panel accurately described and applied the Guidebook scoring guidelines. Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the nexus element, the applied-for string must “match[] the name of the community or [be] a well-known short-form or abbreviation of the community name.”⁷² The Application describes the gay community as including:

individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. . . .

The membership criterion to join the Gay Community is the process of “coming out”. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).⁷³

The Second CPE Panel determined that the Application did not merit any points on the nexus criteria because the string does not “identify” the community. As the Second CPE Panel noted, according to the Guidebook, “identify” in this context “means that the applied for string closely describes the community or the community members, *without over-reaching substantially beyond the community.*”⁷⁴ The Second CPE Panel “determined that more than a

⁷¹ Request, § 8.8.2, Pgs. 16-18.

⁷² Guidebook, § 4.2.3.

⁷³ See Response to Question 20(a), .GAY Application Details, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

⁷⁴ Second CPE Report, Pg. 5.

small part of the applicant’s defined community is not identified by the applied-for string . . . and that it therefore does not meet the requirements for Nexus.”⁷⁵

The Second CPE Panel concluded that the string did not match the Application’s definition of the community because the “application attempts to represent several groups of people, namely lesbian, gay, bisexual, transgender, queer, intersex, and ally (LGBTQIA) individuals.”⁷⁶ In other words, the Second CPE Panel held that the community definition proposed in the Application was over-inclusive in comparison to the string, because “‘gay’ is most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.”⁷⁷ The Second CPE Panel complied with all policies and procedures in reaching this conclusion.

The Requester, however, claims that the EIU “has not taken into account Requester’s specific arguments for including ‘allies’ in its community definition.”⁷⁸ More generally, the Requester argues that reconsideration is warranted because the Second CPE Panel purportedly “has not taken into account arguments provided by Requester in its application, in additional submissions to ICANN, as well as in the context of Clarifying Questions that was issued during the second CPE[.]”⁷⁹ However, the Requester offers no evidence that the Second CPE Panel improperly excluded any document or information from its consideration in rendering the Second CPE Report. In fact, the Second CPE Panel expressly noted that it “has evaluated”

⁷⁵ *Id.* at Pg. 5.

⁷⁶ *Id.*

⁷⁷ *Id.* at Pg. 6.

⁷⁸ Request, § 8.8.2, Pg. 17.

⁷⁹ *Id.* at Pg. 19.

evidence the Requester submitted “both prior to and since its initial evaluation,” and that it also conducted independent research.⁸⁰

In sum, the Requester does not identify any policy or procedure that the Second CPE Panel misapplied in scoring element 2-A, and the Requester’s substantive disagreement with the Second CPE Panel’s conclusion does not support reconsideration.

6. The Second CPE Panel’s Analysis Of Element 2-A (Nexus) Is Not Inconsistent With Other CPE Panels’ Reports In A Manner Constituting A Policy Or Procedure Violation.

With respect to the nexus element, the Requester next contends that the EIU has “used double standards in preparing the various CPE panel reports, and is discriminating between the various community-based applicants[.]”⁸¹ Specifically, the Requester notes that the Second CPE Panel found that the Application lacked a nexus to the gay community because the Application’s community definition was over-inclusive insofar as the string .GAY does not identify “transgender, intersex, and ally individuals” yet they are included in the Application’s community definition.⁸² The Requester then cites two CPE panel reports that purportedly show that “the EIU does not seem to have issues with similar concepts” with respect to other applications.⁸³

First, the Requester cites the CPE panel evaluating an application for the string .OSAKA, which awarded full points in the nexus category even though the community definition included not just those living in Osaka but also “those who self identify as having a tie to Osaka.”⁸⁴

Second, the Requester cites the CPE panel evaluating an application for the string .HOTEL,

⁸⁰ Second CPE Report, Pg. 5.

⁸¹ Request, § 8.8.2, Pg. 18.

⁸² Second CPE Report, Pg. 5.

⁸³ Request, § 8.8.2, Pg. 18.

⁸⁴ Annex C-13 to Request 14-44, *available at* <https://www.icann.org/en/system/files/files/request-dotgay-annexes-redacted-29nov14-en.pdf>, Pgs. 1, 4; Request, Annex 8.

which awarded partial points in the nexus category even though it noted there was an insubstantial amount of overreach inherent to the community definition, which includes some entities that are merely “related to hotels.”⁸⁵ Comparing these reports to the Second CPE Report here discloses no inconsistency that could comprise a policy or procedure violation.

As explained above, different outcomes by different independent experts related to different gTLD applications are to be expected, and do not constitute evidence of any policy or procedure violation. For instance, the .OSAKA string has been designated a geographic name string, unlike .GAY.⁸⁶ As such, a host of distinct considerations come into play with respect to each step of the evaluation and, in addressing the nexus component, the CPE panel evaluating .OSAKA specifically referred to the governmental support the applicant had demonstrated.⁸⁷ As for .HOTEL, the CPE panel awarded partial credit to the applicant, finding the string “closely describes the community” and “identifies the name of the community” and noted only one potential deficiency, namely the possibility that a “small part of the community” identified in the application might not match the string name.⁸⁸ Here, in contrast, the Second CPE Report found that the proposed community was significantly over-inclusive.⁸⁹ There is no policy or procedure violation because there is simply no inconsistency: the .HOTEL report found only mild problems with the proposed community definition and awarded a partial nexus score; whereas the Second CPE Report here identified multiple mismatches between the proposed community and the string name, and awarded no points for the nexus element.

⁸⁵ Annex C-14 to Request 14-44, *available at* <https://www.icann.org/en/system/files/files/request-dotgay-annexes-redacted-29nov14-en.pdf>, Pg. 4.

⁸⁶ *See* Initial Evaluation for Interlink Co., Ltd.’s Application for .OSAKA, *available at* <http://newgtlds.icann.org/sites/default/files/ier/viun4exoaqie2hl0qojm7uvi/ie-1-901-9391-en.pdf>.

⁸⁷ Annex C-13 to Request 14-44, *available at* <https://www.icann.org/en/system/files/files/request-dotgay-annexes-redacted-29nov14-en.pdf>, Pg. 4.

⁸⁸ Annex C-14 to Request 14-44, *available at* <https://www.icann.org/en/system/files/files/request-dotgay-annexes-redacted-29nov14-en.pdf>, Pg. 4.

⁸⁹ Second CPE Report, Pgs. 5-6.

In essence, the Requester complains that it lost whereas other applicants prevailed in scoring nexus points, but no reconsideration is warranted on this ground given that the Requester has failed to show that any policy or procedure violation led to the award of zero points.

7. The Second CPE Panel’s Analysis of Element 4-A (Support) Is Not Inconsistent With Other CPE Panels’ Reports In A Manner Constituting A Policy Or Procedure Violation.

The Requester contends that reconsideration is warranted because it claims two other CPE panels awarded the full two points with respect to the support criterion (element 4-A) even while finding there was no single organization representative of the entire community, whereas the Second CPE Panel awarded the Requester only one point because no such organization exists.⁹⁰ As explained above, it is to be expected that different panels will come to different conclusions with respect to different applications evaluating different information. Moreover, there is no inconsistency. Those other CPE panels determined that the applicant had provided documented support from a “recognized” community institution, as defined in the Guidebook to mean one “representative of the community.”⁹¹ The Requester was unable to provide documented support from any such group, and for that reason the Second CPE Panel did not award it two points with respect to the support criterion (element 4-A), in accordance with the Guidebook.

The CPE Guidelines provide that an Application will be awarded one point for element 4-A if it demonstrates “[d]ocumented support from at least one group with relevance.”⁹² The Second CPE Panel found that the Application met this one-point standard because at least one

⁹⁰ Request, § 8.9, Pgs. 19-20.

⁹¹ See Guidebook § 4.2.3; See .RADIO CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>; .HOTEL CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

⁹² CPE Guidelines, Pg. 16.

relevant group supported the Application.⁹³ To warrant an award of *two* points, though, it must be the case that the “Applicant is, or has documented support from, *the* recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community[.]”⁹⁴ Here, the Second CPE Panel concluded that the Requester was ineligible for a two-point award given that it is “not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s)” in part because “[t]here is no single such organization recognized by all of the defined community’s members as the representative of the defined community in its entirety.”⁹⁵

The Requester claims reconsideration is warranted because in so concluding, the Second CPE Panel did not consider “decisions that have been taken in the context of Community Objections,” which purportedly suggest that the International Lesbian, Gay, Bisexual, Trans and Intersex Association” is “*the* organization to represent the targeted community.”⁹⁶ This does not warrant reconsideration. For the reasons discussed above in Section B.4, no policy or procedure requires CPE panels to take into account documents submitted or determinations rendered in community objection proceedings.

The Requester also argues that reconsideration is warranted because two other CPE panels (those evaluating .RADIO and .HOTEL) awarded the full two points as to the support element.⁹⁷ Yet there is no inconsistency between those reports and the Second CPE Report here: neither of the previous reports *expressly* found that *no* single organization represents the

⁹³ Second CPE Report, Pgs. 10-11.

⁹⁴ CPE Guidelines, Pg. 16 (emphasis added).

⁹⁵ Second CPE Report, Pg. 11.

⁹⁶ Request, § 8.9, Pg. 20 (emphasis in original).

⁹⁷ Request, § 8.9, Pg. 17.

community.⁹⁸ Here, in contrast, the Second CPE Panel explicitly found that no such organization exists with respect to the gay community. The Second CPE Panel thereafter followed the Guidebook, which does not permit a two-point award in the absence of support from a “recognized” organization, defined as one that is “clearly recognized by the community members as representative of the community.”⁹⁹

As such, there was no procedural irregularity with respect to the “support” prong of the community endorsement element. The Second CPE Panel adhered to the applicable rules and policies and no reconsideration is warranted.

C. The EIU Complied With All Applicable Policies And Procedures In Administering The Second CPE, Including The BGC’s Determination On Request 14-44.

The Requester contends that reconsideration is warranted because “it appears that both during the first and second CPE, the EIU appointed the same evaluator for performing the new CPE,” in contravention of the BGC’s Determination on Request 14-44.¹⁰⁰ However, this argument is inaccurate. The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE,¹⁰¹ the fact is that the author of the emails submitted by the Requester conducted *neither* CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the

⁹⁸ See .RADIO CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, .HOTEL CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

⁹⁹ See Guidebook § 4.2.3.

¹⁰⁰ Request, § 8.11, Pg. 22.

¹⁰¹ See Request, Annexes 9-A, 9-B.

ordinary course of his work for the EIU.¹⁰² Moreover, the identities of CPE evaluators are confidential. ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and replaced one core team member for the administration of the Second CPE.

D. ICANN Staff Adhered To Applicable Policies And Procedures In Responding To The Second DIDP Request.

The Requester does not identify any policy or procedure that ICANN staff violated in responding to the Second DIDP Request. Rather, the Requester merely disagrees with ICANN staff's determination that certain documents requested in the Second DIDP Request were subject to DIDP Nondisclosure Conditions, as well as ICANN's determination that, on balance, the potential harm from the release of the documents subject to the Nondisclosure Conditions outweighs the public interest in disclosure.¹⁰³ As such, reconsideration is not appropriate.

1. ICANN Staff Adhered to the DIDP and DIDP Response Process in Finding Certain Requested Documents Subject to DIDP Nondisclosure Conditions.

The DIDP identifies a number of "conditions for the nondisclosure of information," such as documents containing "information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constitutes, and/or other entities" and "drafts of all correspondence, reports, documents . . . or any other forms of communication."¹⁰⁴ It is ICANN staff's responsibility to determine whether requested documents fall within those Nondisclosure Conditions. Specifically, pursuant to the DIDP Response Process, "a review is

¹⁰² The Requester notes that the CPE Panel Process Document indicates that one of the "two evaluators assigned to assess the same string verifies the letters of support and opposition." (CPE Panel Process Document at Pg. 5; Request, § 8.11, Pg. 22.) However, that process does not necessarily mean that one of the CPE Panel members must actually send the verification emails from his or her own email account; one of the two evaluators must only be "responsible for the letter verification process." (*Id.*) No policy or procedure precludes the CPE Panel members from delegating the physical sending of the verification emails to the authors of letters submitted in support or opposition to the Application, as occurred here; in fact, the CPE Panel Process Document requires only that authors of letters "send an email *to the EIU* acknowledging that the letter is authentic." (*Id.* (emphasis added).)

¹⁰³ Request, § 8.10, Pg. 21.

¹⁰⁴ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN’s website].”¹⁰⁵ Here, the Second DIDP Request sought 24 categories of documents. In response to all but three, ICANN responded by providing documents and/or links to responsive publicly available documents. With respect to the others—*i.e.*, those numbered 2, 3 and 4 in the Second DIDP Request—ICANN determined that the requested documents were subject to Nondisclosure Conditions. In so determining, ICANN adhered to the DIDP Response Process.

As to items 2, 3 and 4, ICANN staff analyzed the Requester’s request in view of the DIDP Nondisclosure Conditions, determined that to the extent that those documents existed in ICANN’s possession and had not already been made public, those documents were subject to several Nondisclosure Conditions, namely:

Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; and (iii) complying with which is not feasible.

Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors’ Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

¹⁰⁵ See “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

Information subject to the attorney client privilege, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.¹⁰⁶

ICANN must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply. In conformance with the publicly posted DIDP Response Process, ICANN undertook such analysis, as noted above, and articulated its conclusions in the Second DIDP Response. While the Requester may not agree with ICANN's determination that certain Nondisclosure Conditions apply to three out of 24 of its requests, ICANN has the discretion to determine whether the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the harm that may be caused by such disclosure.¹⁰⁷ The Requester identifies no policy or procedure that ICANN staff violated in making its determination, and the Requester's substantive disagreement with that determination is not a basis for reconsideration.

2. ICANN Staff Adhered to the DIDP in Finding that Certain Requested Documents Were Not in ICANN's Possession.

The Requester also appears to object to ICANN's representation that certain of the requested documents could not be made publicly available because they were not within ICANN's possession.¹⁰⁸ This argument does not support reconsideration of the Second DIDP Response.

¹⁰⁶ DIDP Response, Pg. 7.

¹⁰⁷ *Id.*

¹⁰⁸ Request, § 8.10, Pg. 21.

The Requester claims that, due to certain provisions found in the contract between ICANN and the EIU, “ICANN has the opportunity to have insight in materials that have been prepared by the EIU in the context of Community Priority Evaluation; however, it has deliberately chosen not to request access to such information[.]”¹⁰⁹ However, the DIDP is more limited in nature. ICANN’s DIDP process is designed to “ensure that information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”¹¹⁰ Moreover, the DIDP does not impose any duty on ICANN to compile or create documents, or to gather documents from third parties.¹¹¹ For these reasons, ICANN staff acted in accordance with established policy and procedure in responding to the Second DIDP Request, and in noting that ICANN is not able to make public documents that are not within its possession, custody, or control, including those in the possession of the EIU.¹¹²

V. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Request 15-21. If the Requester believes that it has somehow been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board consideration is required. As discussed above, Request 15-21 seeks reconsideration of a staff

¹⁰⁹ *Id.*

¹¹⁰ <https://www.icann.org/resources/pages/didp-2012-02-25-en> (emphasis added).

¹¹¹ *See id.*

¹¹² DIDP Response, Pgs. 9-10.

action or inaction. As such, after consideration of Request 15-21, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 21 November 2015. However, the first practical opportunity for the BGC to fully consider Request 15-21 was at its meetings on 13 January and 1 February 2016, because the Requester asked that Request 15-21 be suspended until ICANN responded to the Requester's Second DIDP Request and the Requester was provided with an opportunity to submit any additional arguments. ICANN agreed, and the Requester was provided fourteen days within which to amend Request 15-21 after receiving the Second DIDP Response on 21 November 2015. The Requester submitted Revised Request 15-21 on 4 December 2015.